Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Revision of the Commission's Program Carriage Rules	 MB Docket No. 11-131

REPLY COMMENTS OF MEDIA ACCESS PROJECT AND PUBLIC KNOWLEDGE

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REPLY COMMENTS OF MEDIA ACCESS PROJECT AND PUBLIC KNOWLEDGE

Media Access Project and Public Knowledge (jointly "Public Interest Counsel") submit this reply in response to the Federal Communications Commission's ("Commission") *Notice of Proposed Rulemaking*, released August 1, 2011,[1] to conduct a critical reexamination of the Commission's rules protecting the public's interest in diverse program carriage offerings under Section 616.

SUMMARY

The Commission's reexamination of its rules protecting the public's interest in diverse program carriage offerings is necessary to ensure the Commission is meeting an important governmental interest, and its Congressional mandate. Far from threatening First Amendment rights, the program carriage rules secure them by preventing abuses of power by the entities that control the essential pathway for cable speech.

Fifteen years after the Commission adopted the existing rules under Section 616, marketplace realities call for even stronger measures than those proposed. Increased horizontal concentration and vertical integration perpetuates the imbalance of power between cable operators and program vendors. Cable operators continue to favor programming affiliated with cable operators, broadcasters, and other large programming conglomerates, to the detriment of independent programmers. Independent programmers continue to struggle for long-term viability. Moreover, so as to prevent the recent emergence of upstart online video distributors from addressing the lack of diversity in the

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[1] *Revision of the Commission's Program Carriage Rules*, MB Docket No 11-131, Notice of Proposed Rulemaking, *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42, Second Report and Order, 26 FCCRcd 11494 (2011) ("*NPRM*").

delivery options for independent video programming vendors, MVPDs are seeking to exert their leverage over independent programmers anticompetitively, including by requesting exclusivity in online distribution in exchange for carriage. Accordingly the Commission is well within its rights, and only can meet its duties, by taking further actions to discourage and ameliorate the harms posed by discrimination against unaffiliated networks, in its many forms, and nurture emerging competition from online video distribution models.

I. THE FIRST AMENDMENT DOES NOT PRECLUDE THE PROGRAM CARRIAGE RULES.

The Commission has undertaken to alter its program carriage regime so as to ensure the viability of nonaffiliated programmers and encourage a competitive marketplace. Those seeking to curb competition from nonaffiliated programmers and online video providers claim that the First Amendment precludes the Commission from prohibiting discrimination in program carriage arrangements because such action would fail strict and even intermediate scrutiny. This argument is legally and factually untenable.

Along with the leased access rules upheld by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*, the Commission's program carriage rules "do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed."[2] Like the must-carry provisions that the Supreme Court upheld in *Turner Broadcasting System, Inc. v. FCC*, they are meant to protect the viewing public from "what Congress determined to be unfair competition."[3] Indeed, no one disputes that the program carriage rules set certain parameters on an MVPD's ability to discriminate

[2] 93 F.3d 957, 969 (D.C. Cir. 1996) (*Time Warner II*).
[3] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 652 (1994) (*Turner I*).

against providers based on their lack of affiliation, a separate and distinct characteristic borne out of the structure of cable television. Specifically, the Commission's rules forbid vertically integrated cable operators from "engag[ing] in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[4] In other words, if a cable operator chooses to integrate vertically, it is prohibited from treating independent programmers worse than it treats affiliated programmers in the selection, terms, or conditions for program carriage. That is all.[5]

By prescribing program carriage rules, Congress acted to curb the power of entities which "simply by virtue of…ownership of the essential pathway for cable speech, …can prevent its subscribers from obtaining access to programming it chooses to

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[4] 47 C.F.R. § 76.1301(c).

[5] *See generally* Initial Decision of Chief ALJ Richard L. Sippel, *In the Matter of Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204 (rel. Dec. 16, 2011), ¶¶102-104 ("Tennis Channel ALJ Decision"). As the Chief ALJ observes, a case involving "whether the terms and conditions associated with [an MVPD's] distribution of [a non-affiliated channel] constitute discrimination or favoritism on the basis of affiliation or non-affiliation," "does not adversely affect [that MVPD's] First Amendment rights," *id* at ¶102. This is because all an adverse decision to an MVPD can compel is equal treatment – a remedy which, "if granted, would not constitute 'mandatory carriage,' or otherwise compel speech," because the remedy leaves completely to the MVPD the "editorial judgment" as to whether to carry the nonaffiliated channel, and if so, the manner in which the distribution should be effected," be that repositioning affiliated or nonaffiliated channels or not carry any of the implicated channels at all. *Id*. at ¶103. Importantly, the First Amendment analysis on this particular issue does not preclude the Commission from acting in situations where MVPDs need not be vertically integrated to have incentive to discriminate on the basis of affiliation. *See, e.g.*, Comments of HDNet Entertainment LLC, MB Docket No. 11-131, at 11–13 (discussing the harms of discrimination on the basis of affiliation with other programmers).

exclude," and thus "silence the voice of competing speakers with a mere flick of the switch,"[6] to act anti-competitively. Accordingly, the applicable standard for any related review is intermediate scrutiny, under which the program carriage rules will be upheld so long as "the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech that necessary to achieve the aim."[7]

The Commission's interest in the program carriage regime is important and substantial. The rules are intended to meet the Commission's Congressional mandate to protect the viewing public by protecting competition and diversity in a video programming marketplace dominated by MVPDs and their increased number of affiliates. The Supreme Court already has decided that the promotion of both "the widespread dissemination of information from a multiplicity of sources" and "fair competition in the market for television programming" meets important governmental objectives unrelated to speech suppression.[8] Here, the content-neutral relief proposed by the Commission – and Public Interest Counsel in the earlier Comments – promotes diversity and competition in television programming. Most notably, the proposed relief is only available given a reasonable likelihood of discrimination, such as when unaffiliated programming is in direct competition for viewers with affiliated programming and received disparate treatment – in other words, when an MVPD

[6] *See Turner I*, 512 U.S at 656.
[7] *Time Warner II*, 93 F.3d at 969. *See also id.* at 978 (restrictions upon vertically integrated programmers "are content-neutral on their face, regulating cable programmers and operators on the basis of the economics of ownership, a characteristic unrelated to the content of the speech.") (internal quotations and citations omitted).
[8] *Turner I*, 512 U.S. at 662.

appeared to seek to improve its own bottom line at the expense of the twin Congressional goals of diversity and competition in cable programming.

Nevertheless Time Warner Cable Inc. ("TWC") argues that nothing can pass muster under the First Amendment, not even "the existing restrictions on discrimination in favor of an MVPD's *own* affiliated programming vendor."[9] TWC offers as paper-thin support its own hypothesis that there is no longer a risk "that cable operators might attempt to limit programming" by discriminating against unaffiliated services.[10] TWC does not provide any evidence against Congress's specific finding accompanying the 1992 Cable Act[11] and the Commission's repeated concurrence[12] that, with increased consolidation, MVPDs carry an increased incentive to discriminate against independent entities. It does not because it cannot.

"[I]t is undisputed that the Government has an interest in eliminating restraints on fair competition…, even when the individuals or entities subject to particular regulations

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[9] Comments of TWC, MB Docket No. 11-131, at 1 (emphasis in original).
[10] Comments of TWC at 4-5.
[11] 1992 Cable Act §2(a)(5).
[12] *See*, *e.g.*, Second Report and Order, *Implementation of the Cable Act of 1992*, 9 FCCRcd 2642, ¶ 2 (1993) (*1993 Program Carriage Order*) (Vertically integrated cable operators "have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems," and independent programmers "may suffer harm to the extent that they do not receive [the same] favorable terms" offered to cable-affiliated networks.); Memorandum Opinion and Order, *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCCRcd 4238, ¶110 (2011) ("*Comcast Merger Order*") ("[V]ertical integration…will increase the ability and incentive for [discrimination] against or foreclos[ure of] unaffiliated programming."), ¶ 116 (independent networks may "compete less aggressively with [cable-affiliated] networks, allowing the latter to obtain or (to the extent they may already possess it) maintain market power with respect to advertisers seeking access to their viewers.").

are engaged in expressive activity protected by the First Amendment."[13] The Supreme Court decided long ago that the First Amendment does not preclude "regulations […] based on permissible public-interest goals" such as "the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources."[14] Consolidation of ownership threatens diversity, regardless of the fact that "evidence of specific abuses by common owners is difficult to compile."[15] The program carriage rules, like rules preserving diversification of ownership, "enhance the possibility of achieving greater diversity of viewpoints."[16] Moreover, with respect to rules encouraging media diversification, the Commission is "entitled to rely on its judgment, based on experience," that true diversity is best preserved by robust program carriage rules, through which the public is more likely to benefit from "the divergency of …viewpoints[.]"[17]

Congress tasked the Commission with determining and undertaking appropriate action to limit MVPDs from withholding carriage or otherwise hampering unaffiliated programmers' efforts to attract new viewers and compete for additional programming against affiliated channels. Fifteen years after the Commission adopted the existing rules under Section 616, marketplace realities demonstrate the need for stronger measures. Study after study confirms that cable operators continue to favor programming affiliated with cable operators, broadcasters, and other large programming conglomerates to the

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[13] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190 (1997) (internal quotations and citations omitted).
[14] *FCC v. Nat'l Citizens Comm't for Broadcasting*, 436 U.S. 775, 795-96 (1978) (internal quotations and citations omitted).
[15] *See id*. at 797 (internal quotations and citations omitted).
[16] *See id*. at 796.
[17] *See id*. at 797 (internal quotations and citations omitted).

detriment of independent programmers. Where independent programmers do secure carriage, they do so on terms that cannot provide long-term viability. The Commission can revisit the decisions it made in 1993 and recalibrate the rules to achieve the goals of competition and diversity intended by Congress. Recent developments only have increased the risks of discrimination against unaffiliated programmers.[18] The marketplace realities demonstrate that the Commission must use the broad authority given to it by Congress in Section 616 to create the vibrant programming market that Congress envisioned would emerge from the 1992 Act.[19] Thus, Public Interest Commenters urge the Commission to protect the public's interest in diversity and competition in the video programming marketplace by according the unsupported, and unsupportable, arguments made by self-interested, wealth-maximizing MVPDs the little weight they merit.

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[18] *See*, *e.g.*, *Comcast Merger Order*, ¶ 3 (finding subject merger application would "effectuate an unprecedented aggregation of video programming content with control over [distribution]"); Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. to Time Warner Cable Inc., et al.*, 21 FCCRcd 8203, ¶ 116 (determining consolidation would increase the incentive and ability of Comcast and TWC to deny carriage to unaffiliated sports programming).

[19] *See*, *e.g.*, Tennis Channel ALJ Decision, ¶55 ("Top Executives in Comcast Cable have acknowledged that Comcast Cable gives preferential treatment to its affiliated networks," which "get treated like siblings as opposed to strangers."), ¶57 ("Comcast Cable's practice is to transmit affiliated sports networks more broadly than unaffiliated sports networks."), ¶58 ("[A]ffiliation by itself generally is sufficient to ensure that a sports network is widely distributed on Comcast systems."), ¶60 ("…in 2009 [Comcast Cable's then-Executive Vice President of Content Acquisition] assisted [a Comcast affiliate] in its negotiations with DIRECTV relating to level of distribution and other terms and conditions of [the affiliate's] carriage.").

II. CURRENT MARKET CONCENTRATION AND THE EMERGING ONLINE VIDEO MARKET DEMONSTRATE THE CONTINUED NEED FOR PROGRAM CARRIAGE RULES.

Recent developments in video programming distribution models only highlight the continued need for fair and effective program carriage rules. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media," and specifically, "where cable television systems are not subject to effective competition," to "ensure that consumer interests are protected in receipt of cable service; and… ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers."[20] As the Commission explained when it first implemented the program carriage rules, Congress created the rules out of a concern "that increased horizontal concentration and vertical integration… created an imbalance of power between cable operators and program vendors."[21] Congress was sufficiently concerned that it considered banning vertical integration altogether, before settling upon a ban on affiliation discrimination.[22] Increased market concentration and vertical integration render the program carriage rules more relevant today than when they were written, and this effect is only heightened by the recent emergence of upstart online video distributors.

The video programming marketplace continues to lack meaningful diversity in the delivery options for independent video programming vendors. As a result, MVPDs wield

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[20] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463.
[21] *1993 Program Carriage Order* at ¶ 2.
[22] *See* S. Rep. No. 102-92, at 27, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1160 (rejecting proposal to ban vertical integration in favor of "ensur[ing] that cable operators do not favor their affiliated programmers over others" by "bar[ring] cable operators from discriminating against unaffiliated programmers").

substantial leverage over independent programmers and have the ability to behave anti-competitively, threatening the diversity of programming options for consumers. In this inquiry, the most important issue is market concentration on the buyers' (MVPD) side of the market.[23] Despite some commenters' assertion that video programming diversity has been achieved and competition now makes it impossible for any MVPD to behave anti-competitively against independent programmers,[24] the realities of the marketplace demonstrate that independent programmers, regardless of the merits of their programming, often find themselves precluded from competing based on their lack of affiliation.[25]

The recent emergence of online video distributors (OVDs) only bolsters the case for fair and effective program carriage rules. Contrary to MVPDs' claims,[26] the fresh competition presented by new market entrants in the online video space only increases the need for the program carriage rules, because well-established MVPDs have additional incentive and ability to stifle or control the nascent online video market before OVDs have a chance to become robust competitors.[27] For example, TWC argues that it "compete[s] vigorously with satellite providers, telecommunications carriers, and online video distributors, among others," and notes that "a number of potential new entrants

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[23] *See, e.g.*, *Sprint Nextel Corp. v. AT&T Inc.*, No. 11-1600, slip op. at 20 (D.D.C. Nov. 2, 2011) (citing *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007); *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001)).
[24] *See, e.g.*, Comments of Comcast at 1–2.
[25] *See* Comments of Current TV LLC, Game Show Network, LLC, NFL Enterprises LLC, and The Tennis Channel, Inc., at 1–2.
[26] Comments of Comcast at 12.
[27] *See* Competitive Impact Statement at 18, *United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. Jan. 18, 2011) ("…OVDs currently have a *de minimis* share of the video programming distribution market. Their current market share, however, greatly understates their potential competitive significance in this market.").

appear poised to introduce new service offerings."[28] TWC contends that this shows how programmers and consumers no longer need the protections of the program carriage rules, but the real import of its assertions is exactly the opposite. A company is most tempted to behave anti-competitively when faced with the prospect of new competitors, because that is when the would-be competitors are vulnerable enough to be shut out of the market entirely. If the company has enough buying power to choke off the new competitors' inputs, as the largest MVPDs do, the incumbent will never need to compete with new market entrants. So, to avoid competing with OVDs, MVPDs can use their negotiating leverage to restrict new online video offerings in any number of ways: preventing programmers from providing video to OVDs at all, requiring exclusivity in online distribution, or placing unreasonable delay or conditions on online distribution. Indeed, these are the types of provisions that MVPDs currently attempt to secure over the course of negotiations with independent programmers.[29] Thus as MVPDs act consistent with their increased incentive as gatekeepers to stifle competition from innovative new market entrants, robust program carriage rules are necessary to benefit consumers – and fulfill the Commission's diversity mandate – by preventing discriminatory or otherwise anti-competitive conduct.

The entrance of some small video programming distributors in the market does not negate the bargaining power of large MVPDs. These entrants notwithstanding, when some of the MVPDs buying video programming control more than 30% of the local market, independent programmers cannot resist the demands of their largest customers. Moreover, with the proliferation of most-favored nation (MFN) clauses in contracts

[28] Comments of TWC at 5–6.
[29] *See also Comcast Merger Order*, ¶¶61, 70–71.

between MVPDs and programmers,[30] only one MVPD need secure this advantage to force the programmer to give any concession broadly to the many other MVPDs that also have MFN clauses in their programming contracts. In other words, a single concession made to one MVPD will start a domino effect in the programmers' contracts to other MVPDs, placing any new entrants in a comparatively weak position.

This is particularly true when the MVPD has vertically integrated with large programmers and Internet access service providers. Such an MVPD likely would have an increased market share among consumers in the cable market, and its ownership of programming vendors increases its means and motivation to favor its own programming in carriage agreements. Even if a programmer attempted to partner with an upstart MVPD competitor, any favorable terms that programmer gave to the smaller MVPD could also be picked up by the larger MVPD by virtue of its MFN clause.

In its comments, Comcast repeatedly refers to the NCTA's data for the top twenty-five MVPDs as of June 2011[31] to support its claims of competition among MVPDs,[32] but this chart falsely assumes that all of the MVPDs are competing with each other for any particular customer. This is not so. As the Department of Justice found in its analysis of the recent merger between Comcast and NBC Universal, "[t]he incumbent cable companies often dominate any particular market and typically hold well over 50

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[30] *See* Comments of Current TV LLC, Game Show Network, LLC, NFL Enterprises LLC, and The Tennis Channel, Inc., at 32–33; Comments of HDNet Entertainment LLC, at 3; Comments of TCR Sport Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network, at 30–31.

[31] *Top 25 Multichannel Video Programming Distributors as of June 2011*, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, http://www.ncta.com/Stats/TopMSOs.aspx (last visited Dec. 12, 2011).

[32] *See* Comments of Comcast, at 8–9.

percent market shares within their franchise areas."[33] For example, Comcast itself holds the following market shares: 67% in Philadelphia, 62% in Chicago, 60% in Miami, and 58% in San Francisco.[34] Each market typically has one cable operator with approximately 60% or more of the market share competing with two satellite operators (at least outside of the urban areas with greatest population density), and perhaps a nascent telephone company competitor.[35] Cable operators thus have the leverage to deny, for example, carriage in Los Angeles barring an independent programmer's agreement to onerous terms, such as demands for online distribution exclusivity. But even taking Comcast's cited data at face value, it only shows how concentrated the video programming distribution market is. This data reveals that the top three MVPDs, only one of which is a traditional cable service, hold nearly 60% of basic video subscribers, and the top 20% of MVPDs have an 80% market share even just among the top twenty-five providers. Again, these percentages only reflect the national aggregated market share, and therefore do not address the fact that an MVPD has far fewer than twenty-five competitors in any given market area, which further increases its bargaining power vis-à-vis independent programmers.

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[33] Competitive Impact Statement at 14, *United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. Jan. 18, 2011).

[34] *Id.*; *Comcast Merger Order*, ¶116.

[35] Competitive Impact Statement at 14, *United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. Jan. 18, 2011). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Docket No. 06-189, Thirteenth Annual Report at Table B-1, 24 FCCRcd 750, 893 (2009) (cable operators serve 59.25% of U.S. households and 86.91% of television-owning households); "Market Profiles," at http://www.tvb.org/ market_profiles (Television Bureau of Advertising market profile showing that cable penetration is 75-85% in the largest Northeastern cities, circa 60% in many Midwestern cities and varying from 50-70% in other markets.).

The video programming market today gives MVPDs considerable opportunity and motivation to behave anti-competitively against video programmers, harming the public's interest in diverse video programming options. The developing, innovative online video distribution models already are under attack by increasingly powerful MVPDs. Thus, pursuant to its statutory directive, the Commission should stop and prevent anti-competitive behavior and threats to programming diversity, while promoting competition in the video programming marketplace across all platforms.

III. CONCLUSION

The program carriage rules are ultimately designed to benefit the public through competition and diversity. Preventing vertically integrated cable operators from using their bottleneck power to deprive consumers of valuable programming is central to ensuring the public benefits from competition and diversity in the video programming marketplace. Affiliation-based discrimination directly harms consumers, who may be unable to view programming if a cable operator discriminates against unaffiliated networks. Accordingly the Commission should take actions consistent with its Congressional mandate, to discourage and ameliorate the harms posed by discrimination against unaffiliated networks, in its many forms, and nurture emerging competition from online video distribution models.

Respectfully submitted,

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